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No. 84-987

IN THE

Supreme Court of the United States

OCTOBER TERM 1985

EXXON CORPORATION, THE BF GOODRICH COMPANY,
UNION CARBIDE CORPORATION, MONSANTO COMPANY
AND TENNECO CHEMICALS, INC.,

Appellants,

vs.

ROBERT HUNT, Administrator of New Jersey Spill
Compensation Fund; CLIFFORD A. GOLDMAN, Treasurer of
the State of New Jersey; SIDNEY GLASER, Director of the
Division of Taxation; JERRY F. ENGLISH, Commissioner of
Environmental Protection; and THE STATE OF
NEW JERSEY,

Appellees.

Appeal From the Supreme Court of New Jersey

APPELLANTS' REPLY BRIEF

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*Appellees.***Appeal From the Supreme Court of New Jersey****APPELLANTS' REPLY BRIEF**

In their opening brief, appellants urged an interpretation of Section 114(c) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9614(c) (CERCLA), which faithfully reflects the plain meaning of CERCLA's terms, its structure and its legislative history. They demonstrated that an essential aspect of

the compromise which led to CERCLA's passage was the decision to limit to \$1.38 billion the special tax imposed on oil and chemicals to create Superfund in response to concerns that any greater tax on such "feedstocks" might unduly burden domestic consumers and put manufacturers at a substantial disadvantage in international markets. (Appnt. Br. 18).¹

Appellants also showed that, to make the most effective use of this limited fund, Congress created a cooperative federal-state scheme to establish priorities for its use. By recognizing the need for prioritization of cleanup expenditures, Congress acknowledged that, at least during an initial five-year experimental period, a feedstock-tax financed fund could not accomplish the cleanup of all hazardous waste sites. (*Id.* at 13-15). *See also*, NJ Br. at 4-5.

Finally, to protect feedstocks from additional special taxes and to encourage State cooperation in observing the priorities of CERCLA, Section 114(c) preempted similar state funds whose "purpose" was to pay cleanup costs that "may be compensated" under CERCLA. (Appnt. Br. at 19-21).

¹By its terms, the CERCLA feedstock tax expired on September 30, 1985, 42 U.S.C. § 9653, and has not been extended.

On September 26, 1985, the Senate adopted H.R. 2005 (originally S. 51), which substantially broadens CERCLA's taxation scheme, so that the feedstock tax accounts for only 19% of the revenues earmarked for Superfund during the next five years. Concomitant with this broadening of the tax base, § 147 of the Senate bill would delete Section 114(c). 131 Cong. Rec. S12184-S12209 (daily ed. Sept. 26, 1985).

Three Superfund financing schemes have been reported by three committees of the House of Representatives in the current session, all styled H.R. 2817. H.R. Rep. No. 253, Parts 1, 2 & 5, 99th Cong. 1st Sess. (1985). All substantially broaden the CERCLA tax base, albeit in ways which differ from one another and from the Senate bill; under the three House proposals the feedstock tax ranges from 14% to 25%. All versions of the House bill explicitly provide that CERCLA does not preempt State funds.

To play the role envisioned for it by Congress, appellants contend that Section 114(c) must preempt New Jersey's Spill Fund because it is based solely on a feedstock tax and has as its purpose the payment of cleanup costs and natural resource damages that qualify for compensation under CERCLA. Any other interpretation would allow the States to multiply the tax burden on oil and chemicals and use special funds derived from such taxes for cleanup without regard to the priorities established by the federal-State cooperative scheme set forth in CERCLA.

In response to appellants' opening brief, New Jersey offers three arguments to sustain its Spill Fund: (1) Even though a purpose of Spill Fund is to pay costs covered by CERCLA, preemption is avoided so long as expenditures from the Fund are limited to areas not covered by CERCLA (NJ Br. 16); (2) Spill Fund escapes preemption because it also has some purposes (such as cleanup of oil spills) not covered by CERCLA (*id.* at 15); and (3) The preemption directed by CERCLA operates merely to preclude state payment of claims actually paid by the federal government (*id.* at 25). None of these contentions saves New Jersey's Spill Fund from the preemption directed by Section 114(c) of CERCLA.²

²It is unnecessary to discuss at length New Jersey's argument regarding general preemption principles (NJ Br. 17-20), since, for the most part, it merely reiterates the analysis of the State Supreme Court which appellants have shown to be in error. (Appnt. Br. 9-12). However, New Jersey's misreading of *Metropolitan Life Ins. Co. v. Massachusetts*, ____ U.S. ____, 105 S. Ct. 2380, 2390 (1985), deserves comment. The State cites that case for the proposition that "even in cases involving express pre-emption clauses . . . '[t]he presumption is against pre-emption' . . ." (NJ Br. 18). This aspect of *Metropolitan Life*, however, was directed to the "presumption" that Congress had not preempted States from exercising authority over insurance companies, a matter long explicitly committed to State, as opposed to federal regulation. *Id.* at 2390. Elsewhere in the opinion, as in *Aloha Airlines, Inc. v. Director of Taxation*, 464 U.S. 7 (1983), the Court made clear that its task in preemption cases generally is to ascertain Congress' intention, whether "explicitly stated in the statute's language or implicitly contained in its structure and purpose." 105 S. Ct. at 2388.

I. NEW JERSEY'S CONTENTION THAT IT HAS AVOIDED PREEMPTION BY LIMITING SPILL FUND EXPENDITURES TO AREAS NOT COVERED BY CERCLA IS ERRONEOUS.

Section 114(c) indisputably preempts any special state fund whose "purpose" is to pay cleanup costs and natural resource damages which "may be compensated" under CERCLA. New Jersey established its Spill Fund in 1977 to "insure compensation for cleanup costs and damages associated with any discharge of hazardous substances" in accordance with the National Contingency Plan (NCP). (Appnt. Br. 22). Three years later, Congress made clear that all cleanup costs incurred in accordance with the NCP "may be compensated" under CERCLA. (*Id.* at 24).

New Jersey argues that, despite its purpose, Spill Fund avoids preemption because expenditures have been devoted to non-preempted matters. This contention is wrong for two reasons: (1) Under Section 114(c), it is the purpose of a State fund as established by the legislature, rather than the manner in which administrators subsequently expend fund monies, that determines whether the tax which supports the fund is preempted; (2) In any event, payments from New Jersey's Spill Fund have not been limited to matters that are not preempted by CERCLA.

A. The Purpose of New Jersey's Spill Fund Shows That It Is Preempted.

New Jersey concedes that, for the three years prior to CERCLA, "the Spill Fund provided the primary source of revenue for New Jersey's petroleum spill and hazardous waste cleanup program." (NJ Br. 1). However, it asserts that "once [CERCLA] was adopted New Jersey began to administer the Spill Act to supplement rather than to duplicate federal cleanup efforts." (*Id.* at 11). New Jersey never explains how a purported change in the administration of its

Spill Fund is relevant to an inquiry under Section 114(c) regarding the Fund's preempted "purpose."

The closest the State comes to explaining its argument is its contention that it "had the flexibility to adapt its program [to avoid CERCLA preemption] . . . because the New Jersey Legislature had vested broad discretion in the Department of Environmental Protection [DEP] to select the type and extent of cleanup and related activities to be financed by the Spill Act tax." (NJ Br. 11). However, when the Legislature fixed the fund's preempted purpose to conduct cleanup in accordance with the NCP, it also set a tax rate designed to enable the State to fulfill that purpose. Only the Legislature has the authority to change that rate. Thus, even assuming *arguendo* (and contrary to the facts) that, following the enactment of CERCLA, DEP limited expenditures from Spill Fund to oil-spill cleanup and others matters which could not be compensated under CERCLA, DEP did not and could not lower the tax. At most, it could build up unspent revenues in the fund.³

Section 114(c) preempts State taxes designed to maintain a fund whose "purpose" is to pay claims which "may be compensated" under CERCLA. During the five years since CERCLA's enactment, appellants have been paying such a tax to New Jersey.⁴ Whether the State expended the monies derived from that tax for preempted purposes, diverted them to other uses, or simply accumulated large surpluses,

³As of June 30, 1984, Spill Fund had an unspent balance of \$26,859,914. State of New Jersey Spill Compensation Fund, Annual Report for Fiscal Year 1984 (May 1985), p. 5 ("1984 Annual Report").

⁴The revenues raised by the New Jersey Spill tax dramatically increased after CERCLA: In 1978-80, collections were \$6.4, \$6.4 and \$6.8 million; in 1981 and 1982, they were \$14.3 and \$13.8 million. Division of State Auditing—Audit Report—State of New Jersey—New Jersey Spill Compensation Fund, May 13, 1983 ("NJ Audit Report 1983"), Ex. I, p. 4.

the fact remains that the tax is preempted and appellants are entitled to have their payments returned to them.

As this Court held in *Aloha Airlines, Inc. v. Director of Taxation*, 464 U.S. 7, 13-14 (1983), not even a State legislature can "mask the fact that the purpose and effect of [a State taxing] provision" is preempted. *A fortiori*, when the State legislature itself has explicitly declared a purpose for a State tax which is preempted by federal law, the tax's purpose and effect cannot be "mask[ed]" by subsequent spending decisions of State fund administrators.

B. New Jersey Has Not Limited Expenditures from Spill Fund to Matters Not Covered by CERCLA.

New Jersey's claim that it has in the post-CERCLA era limited expenditures to matters not covered by CERCLA is not only irrelevant for the reasons recited above, but it is also factually erroneous.

Appellants demonstrated in their opening brief (p. 25, n.26) that, for the fiscal years ending June 30, 1981 and June 30, 1982, New Jersey expended \$33,432,300 from Spill Fund of which \$28,975,000 was for cleanup at two sites — Chemical Control and Goose Farm — which were among the National Priority List (NPL) sites first proposed by New Jersey and were ultimately placed on the NPL.⁵ In response, New Jersey observes that these monies, "if collected prior to the effective date of CERCLA," would not be preempted (NJ Br. 12, n.7) (emphasis supplied).

The fact is, the vast majority of the massive expenditures made by the State at these two sites had to be financed by taxes collected *after* the enactment of CERCLA. The rec-

⁵Appellants' opening brief reported that \$30,905,600 was spent on these two sites in 1981 and 1982. (Appnt. Br. 25 n. 26). This figure incorrectly included \$1,930,600 expended on Chemical Control in 1979 and 1980, prior to the enactment of CERCLA.

ord demonstrates that when CERCLA became effective in December 1980, the Spill Fund was reported as having a negative balance of \$3,256,296. (JA 25, 27). Moreover, on June 30, 1981, after an infusion of \$14.3 million in taxes for fiscal year 1981, the balance in the Fund was only \$3,250,300.⁶ Obviously, New Jersey did not enter the post-CERCLA era with non-preempted cash in its Spill Fund to pay for cleanup costs which "may be compensated" under CERCLA. All of the post-CERCLA expenditures which were made from the Fund had to be derived from taxes collected after CERCLA's enactment.

New Jersey also obliquely suggests (NJ Br. pp. 11-12, n.7) that its expenditures on these two sites can be excused because they had not yet made their way onto the final NPL. This argument is fallacious for two reasons: First, most, if not all, of the expenditures at these two sites was for "removal" (as opposed to "remedial") costs.⁷ Removal costs "may be compensated" under CERCLA whether or not a site is on the NPL. (See Appnt. Br. 14, 24).

Second, New Jersey nominated both of these sites for inclusion on the NPL, and it was readily apparent that both would appear on that list at the time of its final publication.⁸

⁶NJ Audit Report 1983, Ex. I, p. 4.

⁷See NJ Audit Report, 1983, Ex. 1, p. 4, reporting expenditures of \$31,054,100 and \$1,699,300 for "Hazardous Waste Removal" in Fiscal Years 1981 and 1982, and \$0 and \$46,200 for those years for "Clean-Up and Restoration." See also Division of State Auditing—Audit Report—State of New Jersey—New Jersey Spill Compensation Fund, March 27, 1984, p. 16, referring to \$31.6 million in expenditures in Fiscal Year 1981 "due to the occurrence of two major discharges."

⁸The "Interim Priorities List" of 115 sites announced by EPA on October 23, 1981, listed top priority sites targeted by EPA for response action under CERCLA, including Chemical Control and Goose Farm. 12 Env't. Rep. (BNA) 807, 828-830 (Oct. 30, 1981). EPA selected these sites based on prior nominations by the States. 47 Fed. Reg. 58476, 58479 (1982).

Indeed, the Chemical Control site was repeatedly referred to in the legislative deliberations preceding CERCLA as the type of site that required Superfund response action.⁹ Thus, when New Jersey expended cleanup monies at these sites it fully (and correctly) expected that they would ultimately qualify for compensation under CERCLA.

New Jersey's argument that it changed its ways and, after CERCLA, began restricting its expenditures to non-NPL sites is further refuted by its practices in fiscal years 1983 and 1984: In 1983, the State continued to expend substantial sums on both the Chemical Control and Goose Farm sites — \$300,648 and \$123,797 respectively.¹⁰ In 1984, these expenditures increased to \$732,609.50 and \$250,053.04.¹¹ Given the huge expenditures on these two NPL sites, as well as substantial expenditures at others, for the fiscal years 1981-84, 89% of New Jersey's cleanup expenditures — \$32,315,446 out of \$36,664,847 — were incurred at NPL sites.¹²

⁹126 Cong. Rec. 30939 (1980) (remarks of Sen. Bradley), reprinted in 1 Legis. Hist. at 705; *id.* 30931 (remarks of Sen. Randolph), reprinted in 1 Legis. Hist. at 682; S. Rep. No. 848, 96th Cong., 2d Sess. 12 (1980) (quoting EPA Administrator Costle), reprinted in 1 Legis. Hist. at 319.

¹⁰State of New Jersey Spill Compensation Fund, Annual Report for Fiscal Years 1982 and 1983, pp. 12, 13 (April 1984) ("1982 & 1983 Annual Report").

¹¹1984 Annual Report, p. 11.

These 1983 and 1984 expenditures at these two NPL sites cannot be justified as merely constituting the State's 10% share of the cleanup costs incurred by the federal government pursuant to Section 104(c) of CERCLA, since through June 30, 1984, the federal government has expended a total of only \$782,500 at Chemical Control and \$189,000 at Goose Farm. *Id.* at 15. Indeed, of the vast expenditures which New Jersey has made in cleaning up all sites through June 30, 1984, only \$2,381,741 constitutes the State's 10% share pursuant to Section 104(c) on approved contracts and approved cooperative agreements. *Id.*

¹²*Id.* at 13; 1982 and 1983 Annual Report, p. 13; NJ Audit Report 1983, p. 11. See also the final NPL, 49 Fed. Reg. 19480, 19482 (1984); *id.* 37070,

Finally, the illusion which New Jersey seeks to create that its Spill Fund has been used only for matters that are not covered by CERCLA is shattered by the State's admission that, following CERCLA, it not only expended Spill Fund monies on items not covered by the federal statute, but also those expenditures extended to "items where federal financing is unavailable," even if covered by CERCLA. (NJ Br. 11).

II. THE NON-PREEMPTED PURPOSES OF NEW JERSEY'S SPILL FUND DO NOT SAVE IT FROM PREEMPTION.

New Jersey argues that a state fund with a preempted purpose is nonetheless permissible, if it has other subsidiary non-preempted purposes. Were Section 114(c) so easily avoidable, it would be a simple matter for a State legislature to include non-preempted matters among the purposes of its fund and thereby escape preemption. Congress certainly did not design Section 114(c) to permit this type of evasion, and it should not be so interpreted.

Moreover, as appellants demonstrated in their opening brief, the record before the New Jersey courts showed that the expenditures paid for by the New Jersey fund which are not covered by CERCLA and thus are not compensable under the statute — *i.e.*, oil spill cleanup, research and administrative costs — amounted to only 6% of the total expenditures from the New Jersey fund. (Appnt. Br. 22-23 n.24). Doubtless for this reason, the New Jersey Supreme

37083-37085 (1984); 50 Fed. Reg. 6320, 6321-6322 (1985); *id.* 37630. The \$36,664,847 figure was derived by totalling Spill Fund expenditures through Fiscal Year 1984 and subtracting from that total the amount of state expenditures through Fiscal Year 1980 (excluding costs of damage claims, research, monitoring projects, and net obligation adjustment). The \$32,315,446 figure was derived by using the same method applied to New Jersey's NPL sites, which were identified by comparing the lists of sites in the Annual Reports to the NPL.

Court did not suggest that the "purpose" of the New Jersey fund was to pay for these expenses.¹³ While New Jersey "rejects" appellants' characterization of these expenditures as "incidental" (NJ Br. 21), it does not deny that the record shows that those non-covered expenditures total only 6% of the total expenditures made from the fund.

In an apparent effort to obscure the insignificance of the expenditures made from New Jersey's Spill Fund for items which do not fall within the ambit of CERCLA, the State repeatedly stresses that such items are not covered by that statute, are not compensable from Superfund, and thus are not within the scope of Section 114(c)'s preemption. (See NJ Br. 2, 8, 10, 14, 15, 20, 21). Appellants have never contended otherwise. (See e.g., Appnt. Br. 22, n.24). They have instead argued, and the State has effectively failed to deny, that the New Jersey Spill Fund was not established for the purpose of paying these expenses, but instead was designed and has, for the largest part, been employed by the State to finance cleanup expenditures which are within the coverage of CERCLA.

By its terms Spill Fund called for re-examination in the event of Federal legislation. NJS 58:10-23.11z. This requirement stemmed directly from the recognition that subsequent enactment of a federal cleanup statute would most likely preempt New Jersey's tax. See remarks of State Senator McGahn:

"Finally, [dual] taxation — assuming there is a federal law, there would not be [dual] taxation; there would be

¹³New Jersey asserts that the expenditures for non-covered items "alone support the validity of the Spill Fund tax." (NJ Br. 15). Nothing decided by the State Supreme Court supports this contention; that Court instead rested its decision on the premise that Spill Fund could be used to pay for cleanup costs covered by CERCLA so long as they were not "actually paid" by Superfund.

preemption of anything as far as the state is concerned."¹⁴

However, after the enactment of CERCLA, New Jersey ignored both the preemption of Section 114(c) and the prior directive of its Legislature to re-examine its Spill Fund and instead elected to continue collecting a tax on oil and chemicals designed to serve a broad purpose that clearly overlapped CERCLA. Spill Fund is therefore preempted even though some portion of it might have been saved had New Jersey, like other States, taken timely action to accommodate intervening federal legislation.¹⁵

III. TO READ SECTION 114(c) AS MERELY PREVENTING DOUBLE PAYMENT OF CLEANUP COSTS WOULD NOT ACCOMPLISH ITS CLEAR PURPOSE OF PREVENTING MULTIPLE TAXATION OF OIL AND CHEMICALS.

Appellants have demonstrated (Appnt. Br. 24-27) that the New Jersey Spill Fund cannot be saved by transmuting the phrase "may be compensated" into "actually compensated" or "actually paid," so as to permit New Jersey to maintain a fund for the purpose of paying for CERCLA-eligible cleanup expenditures which the federal government, either for fiscal or policy reasons, does not compensate. Such a construction of the statute defies the plain meaning of its terms, is not supported by the legislative history, ignores the provisos to Section 114(c), and merely duplicates the ban on double recovery set forth in Section 114(b) of CERCLA.

An "actually paid" construction of Section 114(c) would effectively nullify it: Interpreting "may be compensated" as

¹⁴Public Hearing before Senate Committee on Energy and Environment and Assembly Committee on Agriculture and Environment on S-1409 and A-1903 (Spill Compensation and Control Act), June 2, 1976, p. 26.

¹⁵See Part V, *infra*.

"actually paid" would mean that Section 114(c) would preempt only those state funds whose "purpose" is to pay claims that are actually paid by the federal government. Since no State would ever impose a tax to create such a fund, Section 114(c), as interpreted by New Jersey, would never preempt any state tax.

New Jersey attempts to avoid the plain meaning and relevant legislative history of the "may be compensated" formulation of preemption used in Section 114(c) by, for the first time in this litigation, inserting the word "realistically" into that phrase. At first blush, New Jersey's "may realistically be compensated" interpretation seems similar to appellants' own view of the statute. *See, e.g.*, NJ Br. at 25-26:

"[Section 114(c)] presupposes that states will request Superfund financing whenever a site or release falls reasonably within the criteria used to establish NPL ranking for remedial actions, or within the acute toxicity criteria used to determine federal funding for removal actions. To the extent that New Jersey sites remain realistically eligible for federal financing, therefore, Spill Fund revenues could not be used to support independent, state-sponsored cleanup efforts at those sites."

With this formulation of Section 114(c), appellants can readily agree. We recognized in our opening brief (p. 24) that only cleanup costs which are eligible for compensation under CERCLA — *i.e.*, remedial cleanup expenses at NPL sites or removal costs at any site — "may be compensated" under CERCLA.¹⁶

¹⁶Notably, New Jersey claims here only that its Spill Fund "could" be used for non-NPL sites (NJ Br. 24), but does not assert that its fund's "purpose" is to deal with such sites.

New Jersey's "realistically paid" approach asks the Court to assume that every expenditure from Spill Fund on a CERCLA-eligible site was preceded by New Jersey's determination that it was not realistic to expect compensation from CERCLA for such expenditures. As shown above, pp. 7-8, the record does not support any such assumption.

Moreover, New Jersey ultimately transforms its "realistically compensated" test into the same "actual compensated" or "actually paid" test which it had urged at all prior stages of this case. *See* NJ Br. 25:

"Congress limited preemption to those areas where there was a realistic chance of federal financing. Once that opportunity is foreclosed and ineligibility established for any specific action, though, the 'may be compensated' formulation allows state funds to pick up the slack. It was precisely this situation that the Supreme Court in New Jersey addressed when it found that the Spill Fund could be used to finance hazardous waste cleanup costs and related claims 'not actually paid under Superfund.'"

See also id. at 15-16, where New Jersey argues that it can spend monies on NPL sites after EPA "rejects" its applications for compensation; *id.* at 26.

Thus, under New Jersey's view of the statute, it can use Spill Fund to pay cleanup costs at CERCLA-eligible sites. The only thing that the State believes that Spill Fund cannot be used for is to pay for cleanup expenses which are actually paid by the federal government.

The state cannot identify any support for its "realistically/actually compensated" construction of the statute from CERCLA's explicit terms or legislative history. (*See* pp. 16-20, *infra*). Moreover, it does not even attempt to contradict appellants' showing (Appnt. Br. 27-29) that the

provisos to Section 114(c) — regarding permissible uses of general revenues for purposes for which special funds are preempted and of special funds for prepositioning cleanup equipment — lose all meaning in the face of such a construction. New Jersey never explains how general revenues could possibly be used to pay for expenses actually paid for by the federal government, nor does it offer any reason why, if its restricted view of Section 114(c) was intended by Congress, there was any reason for explicit allowance for special-fund financing of clean-up equipment.

Moreover, New Jersey acknowledges that Section 114(b) explicitly prevents double payment by State and federal funds of cleanup costs — the same meaning it would ascribe to Section 114(c) — but seeks to justify such redundancy by observing that Section 114(b) bars double recoveries from all sources, not merely special State funds. (NJ Br. 27). We, too, assume that Section 114(b) broadly condemns double recovery, but the fact remains that New Jersey's construction of Section 114(c) as serving that function for special funds still reduces the section to useless surplusage in the light of Section 114(b).

Finally, New Jersey never suggests how its construction of Section 114(c) as preempting only a tax which would never have to be collected — *i.e.*, one to finance a fund whose “purpose” is to pay compensation for claims that are “actually” or “realistically” paid by the federal government — attributes any meaning to the section. The state never explains why Congress declared the preemption set forth in Section 114(c), if, as New Jersey argues, it only bars States from doing something which they would never have any reason to do.

IV. NEW JERSEY'S LEGISLATIVE HISTORY ARGUMENT IS MISCONCEIVED.

New Jersey argues that preemption had its genesis in oil spill legislation which Congress anticipated “would cover all

necessary costs involved in responding to future spills and in compensating the limited kinds of property damage and natural resource claims proposed for coverage.” (NJ Br. 7). New Jersey thus suggests that, while Congress would have preempted State funds for oil spills had CERCLA covered such incidents, it did not intend to preempt State funds for abandoned hazardous waste site cleanup because federal funding would be insufficient. This argument is wrong on a number of counts.

First, as appellants clearly demonstrated (Appt. Br. 37-42), the “may be compensated” language of Section 114(c) derives directly from and was recognized by New Jersey in Senate hearings as “virtually the same as” (*id.* at 40) the “may be asserted” language of H.R. 85, the initial oil spill cleanup bill. Had Congress intended the restricted interpretation of Section 114(c) which New Jersey now advances, it would not have used language that corresponds to the initial versions of the preemption clause in CERCLA’s predecessor bills, which, as New Jersey concedes, have the same meaning that appellants attribute to Section 114(c).¹⁷

Second, the State argues that preemption under the Administration Bill (S. 1341) was limited to spills. However, this argument ignores the limitations on cleanup of abandoned hazardous waste sites that was contemplated by that

¹⁷New Jersey concedes that a “may be asserted” version of preemption “would have prevented the use of state taxes to finance any claim which could conceivably have been brought under Superfund, regardless of its chances for eventual financing.” (NJ Br. 25). In making this argument, New Jersey fails to recognize that, as we pointed out in our opening brief (Appt. Br. 40), when the “may be compensated” formulation was first proposed, New Jersey in hearings before the Senate Committee on Finance branded it as “virtually the same as [the preemption] in the House oil-spill bill, H.R. 85.” H.R. 85, in turn, preempted all claims which could be “asserted for . . . removal costs” and the like. (*Id.* at 38). Until its merits brief in this Court, the State had recognized that the phrase “may be compensated” was of the same breadth as “may be asserted.”

bill. As Assistant EPA Administrator Jorling explained in the excerpt cited by the State (NJ Br. 35), there was no preemption in S. 1341 of State funding of costs associated with hazardous substance cleanup at abandoned sites because S. 1341 placed very strict limits on the extent to which the proposed federal fund could be used for the payment of removal or remedial costs at such sites. (1 Legis. Hist. 124, 109-10). CERCLA's coverage for such costs is much broader, and thus Section 114(c) was designed to extend preemption to them.

Third, the State's argument based on its description of H.R. 85 as a "comprehensive federal spill fund" which left "no need for co-extensive state programs" (NJ Br. 34) is erroneous. H.R. 85 covered "discharges" broadly defined in § 101(w) as all emissions, including spilling, leaking, pumping, pouring, emptying or dumping. 2 Legis. Hist. 1021. Moreover, H.R. 85 was amended to cover discharges of all hazardous substances and Congress then specifically added a separate preemption provision, § 302, identical to the one dealing with oil spill cleanup (§ 110) that applied to this extended coverage. There is absolutely nothing in the legislative debate on H.R. 85 to support New Jersey's contention that Congress felt funding under H.R. 85, as amended, would accommodate all costs and damages resulting from discharges of hazardous substances. Nonetheless, the debate on that bill makes clear that Congress intended broad preemption in H.R. 85 of all State special fund payment of claims that could be asserted under that bill.¹⁸

What clearly emerges from a reading of the extensive legislative history of CERCLA is that the preemptive language of Section 114(c) derived directly from the pre-

¹⁸125 Cong. Rec. 385 (1979), 126 Cong. Rec. 26196-26197 (1980) (remarks of Rep. Biaggi), reprinted in 2 Legis. Hist. at 470, 904.

emptive language used in H.R. 85, S. 1341 and the proposed amendments to S. 1480. The legislative debate analyzing these various preemption provisions fully supports appellants' argument that, while Section 114(c) does not preempt State taxes on feedstocks to provide funding for items not covered by CERCLA (*e.g.*, oil spill cleanup, purchase or positioning of equipment, administrative costs), it does preempt the imposition of such taxes to fund items which are covered by CERCLA.¹⁹

Finally, as appellants anticipated in their opening brief (Appnt. Br. 42-46), New Jersey's legislative history argument rests heavily upon a single passage in a floor exchange between Senators Randolph and Bradley (NJ Br. 10-11, 41-43). That passage will not bear the weight that New Jersey places upon it.

First, it appears that Senator Randolph was talking in this passage about the preemption of State funds raised before the enactment of CERCLA. He had introduced the matter of existing cleanup funds, pointing out in some detail that the preemption had no application to such funds. He may well have had them in mind in responding to Senator Bradley's immediately following inquiries.

Second, those inquiries consisted of complicated leading questions. Even if Senator Bradley had in mind State funds

¹⁹H.R. Rep. No. 172, Part 1, 96th Cong., 1st Sess. 22 (1979) (accompanying H.R. 85), reprinted in 2 Legis. Hist. at 532; 126 Cong. Rec. 26197 (1980) (colloquy between Representatives Florio and Biaggi on H.R. 85), reprinted in 2 Legis. Hist. at 903-905; *id.* 26197-26198 (colloquy between Representatives Snyder and Biaggi on H.R. 85), reprinted in 2 Legis. Hist. at 905-907; *id.* 26202-26203 (remarks of Rep. Livingston on H.R. 85), reprinted in 2 Legis. Hist. at 919-920; *id.* 27086 (proposed amendment by Sen. Cannon to S. 1480), reprinted in 3 Legis. Hist. at 186; 3 Legis. Hist. at 107 (proposed amendment by Sen. Magnuson to S. 1480); *id.* 30949 (remarks of Sen. Randolph on CERCLA compromise), reprinted in 1 Legis. Hist. at 731; *id.* 31965 (remarks of Rep. Florio on CERCLA compromise), reprinted in 1 Legis. Hist. at 780.

accumulated after CERCLA, one cannot assume a meeting of the minds from Senator Randolph's terse expression of agreement with him. Much greater weight must be attached to the entire course of CERCLA's legislative history and to the more detailed, preceding explanation of the pre-emption provision by Senator Randolph which fully accords with appellants' construction of Section 114(c).²⁰

V. AMICI'S BRIEF HIGHLIGHTS THE INVALIDITY OF THE NEW JERSEY SPILL FUND.

The States who have filed a brief *amici curiae* stress that their taxes are "different from the tax used to support the New Jersey Spill Fund and the federal Superfund." (*Amici* Br. 2). As shown in their brief (*Amici* Br. 2, 4 n.10), California, New York, New Hampshire and Vermont do not impose a feedstock tax to create state spill funds. Instead, these States impose a broad-based tax on generators or disposers of hazardous waste, comparable to the type of tax that was initially contemplated in S. 1480, one of CERCLA's predecessor bills which contained no preemption provision. (*See Appnt. Br. 40*). Moreover, New York and New Hampshire explicitly provide that their funds may not be used for matters covered by CERCLA. 1982 N.Y. Laws Ch. 857 § 19; N.H. Rev. Stat. Ann. § 147-B:6(I).²¹

²⁰Senator Randolph's explanation of Section 114(c) is borrowed almost word for word — including an inadvertent reference to oil spill damage which was not included in the bill he was explaining — from a statement made by Representative Biaggi with respect to H.R. 85. *Compare id.* 30949 (remarks of Sen. Randolph), reprinted in 1 Legis. Hist. 732-733, with *id.* 26196-26197 (remarks of Rep. Biaggi), reprinted in 2 Legis. Hist. 903. Congressman Biaggi's statement clearly expressed the preemption as extending to claims "compensable" under federal law rather than claims "paid for," the language used by Senator Randolph.

²¹California does not so limit expenditures from its fund, but it acknowledges the central purpose of Section 114(c) by not imposing a duplicative tax on oil and chemicals.

In response to the *amici* brief, we have undertaken a survey of the hazardous waste laws of all 50 States. Eight States apparently maintain no special hazardous waste funds.²² Of the 42 that do, only New Jersey's Spill Fund is derived from a broad-based feedstock tax. In the other 41 states, funds are financed through taxes or fees on site operators, hazardous waste generators, legislative appropriations, miscellaneous and other sources or some combination thereof.²³

Thus, New Jersey stands alone in its imposition of a tax on oil and chemicals which duplicates the tax imposed by CERCLA. That all of the other States have managed to create or maintain funds which accommodate CERCLA's ban against double taxation on oil and chemicals clearly shows that there are no arguments of expediency or compelling public policy to justify New Jersey's refusal to modify its fund so as to avoid CERCLA's preemption.²⁴

²²Alaska, Arkansas, Delaware, Hawaii, Nebraska, North Dakota, South Dakota and Wyoming.

²³Attached as an Appendix to this brief is a list of the 41 state statutes concerning hazardous waste funds with citations to the provisions describing the sources of the monies for those funds.

Florida supports two funds — the "Florida Coastal Protection Trust Fund" and the "Water Quality Assurance Trust Fund" — by taxes of 2¢ per barrel payable by operators of facilities that store, transfer or handle "pollutants." Fla. Stat. Ann. §§ 376.11(4)(1), 376.307(5)(a). "Pollutants" are defined to include oil, gasoline, pesticides, ammonia and chlorine. *Id.* § 376.031. A third fund, the "Hazardous Waste Management Trust Fund," is financed by appropriations, cost recoveries and miscellaneous gifts and bequests. *Id.* § 403.725, as amended by 1985 Fla. Sess. Law Serv. ch. 85-164, § 6 (West).

²⁴The legal arguments raised by *amici* can be briefly answered. Their contention (*Amici* Br. 14) that Section 114(c)'s preemption was not effective until the final NPL was published ignores the fact that Congress explicitly made Section 114(c) effective upon the enactment of CERCLA and rejected a proposal to delay its effectiveness for the same 180 days which Congress prescribed for publication of the NPL. Moreover, Congress cast the section's

CONCLUSION

The purpose of the preemption expressed in Section 114(c) is to prevent duplicative state taxes on oil and chemicals for hazardous waste cleanup. Spill Fund is precisely such a tax and should, accordingly, be held invalid.

Respectfully submitted,

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preemptive "may be compensated" language in prospective terms which envision ultimate eligibility for CERCLA compensation. Finally, removal expenditures were immediately eligible for CERCLA compensation, since they are in no way dependent upon designation of a site on the NPL.

Amici's reliance on Section 107 is irrelevant to the issues raised in this case. (*Amici* Br. 9-11). As *amici* state, that section allows "states to initiate cost recovery actions against specified [responsible] parties for [remedial action] expenditures." (*Id.* at 9). Appellants have never suggested that Section 114(c) of CERCLA or any other provision of the statute prohibits States from raising funds in this fashion to pursue cleanup of hazardous waste sites.

Amici assert that appellants have not explained Congress' willingness to allow States to use general revenues to pursue cleanup without regard to the priorities prescribed under CERCLA. *Amici* Br. 12 n.15. However, appellants' opening brief (Appt. Br. 20-21) specifically addressed this issue.

Finally, *Amici's* reiteration of the Solicitor General's argument adds nothing to the points that he has already made and which appellants thoroughly answered in their opening brief. (Appt. Br. 29-32).

APPENDIX

APPENDIX SUMMARY OF STATE FUNDS

Alabama. The "Alabama department of environmental management fund" is financed by permit fees, penalties, fines, appropriations, grants and federal funds. Ala. Code §§ 22-22A-11, 22-22A-5(16).

Alaska. None.

Arizona. Arizona has three hazardous waste funds. The "water quality assurance revolving fund" is financed by legislative appropriations and collected penalties. Ariz. Rev. Stat. Ann. § 36-1854.01. The "hazardous waste trust fund" is financed by fees collected for the use of hazardous waste disposal facilities. *Id.* § 36-2805. The "hazardous waste management fund" is financed by fees on waste facility permit applicants and appropriations. *Id.* § 36-2826.

Arkansas. None.

California. The "Hazardous Substance Account" and the "Hazardous Substance Compensation Account" are financed by taxes on hazardous waste generators, fines, penalties, costs recovered from liable parties, legislative appropriations and federal CERCLA money. Cal. Health & Safety Code §§ 25330, 25343, 25345, 25360, 25380, 25381.

Colorado. Colorado has four funds relating to hazardous waste cleanup. The "hazardous waste service fund," used for the state's expenses in maintaining or supervising hazardous waste facilities, is financed by fees on facility operators. Colo. Rev. Stat. §§ 25-15-303(5), 25-15-304. Second, a county or municipality may set up a "county or municipal hazardous waste disposal site fund", financed by taxes on property within the jurisdiction. *Id.* § 25-15-213. Third, a county or municipality may also establish a separate "hazardous waste disposal site fund", financed by annual fees on private hazardous waste facilities. *Id.* § 25-15-214. Finally, an "emergency response cash fund", financed by penalties and costs recovered in lia-

bility actions, is available for certain emergency responses. *Id.* § 29-22-105.

Connecticut. Connecticut has two hazardous waste funds. The "disposal facility trust fund", used principally for monitoring and maintenance costs, is financed by fees on owners and operators of hazardous waste facilities. Conn. Gen. Stat. Ann. § 22a-126(b). The "emergency spill response fund", used for oil and hazardous waste cleanup, is financed by taxes on hazardous waste generators and treatment facilities, as well as by costs and damages recovered in liability actions. *Id.* §§ 22a-132, 22a-451.

Delaware. None.

Florida. Florida has three special funds. The "Hazardous Waste Management Trust Fund" is financed by appropriations, cost recoveries in liability actions and miscellaneous gifts or bequests. Fla. Stat. Ann. § 403.725, *as amended by* 1985 Fla. Sess. Law Serv. ch. 85-164, § 6 (West). The "Florida Coastal Protection Fund" is financed by taxes of 2¢ per barrel payable by operators of terminal facilities that handle "pollutants," defined to include oil, gasoline, pesticides, ammonia and chlorine, as well as by penalties, cost reimbursements and miscellaneous other fees and charges. *Id.* §§ 376.11(2), (4)(a); 376.031. The "Water Quality Assurance Trust Fund" is financed by taxes of 2¢ per barrel payable by operators of terminal facilities and other facilities that store, handle or transfer pollutants, and by transfers from other state funds. *Id.* §§ 376.307(3), (5).

Georgia. Georgia has two hazardous waste funds. The "hazardous waste facility trust fund" is financed by bonds or other financial responsibility instruments forfeited by owners or operators of certain waste disposal facilities. Ga. Code Ann. § 12-8-68(d). The "hazardous waste trust fund" is financed by civil penalties. *Id.* §§ 12-8-68(e), 12-8-81(d).

Hawaii. None.

Idaho. Idaho has three hazardous waste funds. The "hazardous waste emergency account" is financed by appropriations,

cost recoveries, and miscellaneous other (unidentified) sources. Idaho Code § 39-4417. The "hazardous waste training, emergency and monitoring account" is financed by fees on transporters and waste facility operators, appropriations, donations, gifts, and grants. *Id.* § 39-4417B. The "hazardous waste disposal fee refund account" is financed by fees on operators and penalties. *Id.* § 39-4432.

Illinois. Illinois has two special funds — the "Hazardous Waste Fund" and the "Hazardous Waste Research Fund" — both of which are financed by fees imposed on waste facility owners or operators. Ill. Ann. Stat. ch. 111 § 1022.2.

Indiana. Indiana has three special hazardous waste funds. The "hazardous substances emergency response trust fund" is financed by taxes on waste facility operators for the disposal of hazardous waste. Ind. Code Ann. §§ 6-6-6.6-2, 6-6-6.6-3, 13-7-8.7-2. The "hazardous waste training trust fund" is financed by fees on facility owners. *Id.* § 13-7-8.6-11. Finally, the "Environmental Management Special Fund" is financed by fees collected from waste facility applicants and civil penalties. *Id.* §§ 13-7-13-2, 13-7-8.6-4(e).

Iowa. The "hazardous waste remedial fund" is financed by fees on generators, transporters and waste facility owners and operators, penalties, general revenues, federal funds, and gifts. Iowa Code Ann. §§ 455B.423, 455B.424.

Kansas. The "hazardous waste perpetual care trust fund" is financed by fees on waste facility operators and by civil penalties. Kan. Stat. Ann. §§ 65-3431(w), 65-3444(d).

Kentucky. The "hazardous waste management fund" is financed by annual fees on hazardous waste generators. Ky. Rev. Stat. Ann. § 224.876(6), (11).

Louisiana. Louisiana has three funds relating to hazardous waste releases. The "Environmental Emergency Response Fund" is financed by costs recovered from liable parties, penalties, legislative appropriations and federal grants. La. Rev. Stat. Ann. § 30:1079(A). The "Hazardous Waste Protection

Fund" is financed by bonds forfeited to the state, fees on hazardous waste facility operators, legislative appropriations and federal grants. *Id.* §§ 30:1141, 30:1143. The "Hazardous Waste Site Cleanup Fund" is financed by the same sources as the "Environmental Emergency Response Fund", as well as miscellaneous grants, appropriations and cost reimbursements. *Id.* § 30:1149. In addition, Louisiana imposes on waste generators and disposers a tax on waste storage and disposal and an additional one-time tax on the hazardous waste content of land. Both taxes are payable to the Department of Revenue and Taxation. *Id.* §§ 30:1149.21- 23, 47:822-827.

Maine. The "Maine Hazardous Waste Fund" is financed by fees on waste generators and transporters and on applicants for, and operators of, hazardous facilities and by cost recoveries and penalties. Me. Rev. Stat. Ann. tit. 38, §§ 1319-D, -E, -H, -I.

Maryland. The "State Hazardous Substances Control Fund" is financed by waste facility application and permit fees, renewal fees, penalties, fines, loans and appropriations. Md. Health & Env. Code Ann. § 7-219.

Massachusetts. The "Massachusetts Oil and Hazardous Material Release Prevention Act" authorizes state agencies to impose fees on licensed hazardous waste transporters to be used to pay for state response actions, although the Act does not create a separate fund. Mass. Ann. Laws ch. 21C, § 7.

Michigan. Michigan has had three funds relating to hazardous waste. The "Disposal Facility Trust Fund", abolished in 1983, was financed by fees on waste facility operators. Mich. Stat. Ann. § 13.30(42). The "Hazardous Waste Service Fund" and the "Environmental Response Fund" are financed by appropriations. *Id.* §§ 13.30(43), 13.32(9).

Minnesota. The "Environmental Response, Compensation and Compliance Fund" is financed by taxes on hazardous waste generators, cost reimbursements, penalties and various grants and appropriations. Minn. Stat. §§ 115B.20, 115B.22. The

"state waste management fund" is financed by state bonds and appropriations. *Id.* § 115A.57.

Mississippi. Fees collected from commercial hazardous waste facilities are held in an account maintained in the state Department of Natural Resources for the perpetual care and maintenance of hazardous waste facilities. Miss. Code Ann. § 17-17-53.

Missouri. Missouri has two special funds. The "Hazardous Waste Fund" is financed by permit and license fees, fees and taxes on generators and transporters, appropriations, federal grants and miscellaneous other sources. The "Hazardous Waste Remedial Fund" is financed by fees and taxes on generators, penalties, gifts, bequests, appropriations, reimbursements, and federal grants. Mo. Ann. Stat. §§ 260.380, .390, .391, .475, .478, .480, *as amended by* 1985 Mo. Legis. Serv. No. 5, p. 135 *et seq.* (Senate Bill No. 110) (Vernon).

Montana. The "environmental quality protection fund" is financed by cost reimbursements, penalties, appropriations and funds received in other state accounts including, indirectly, the resource indemnity trust interest account. The latter account is financed by taxes on mine operators engaged in mining, extracting or producing minerals. Mont. Code Ann. §§ 75-10-704, 75-1-1101, 15-38-104, 15-38-106, 15-38-201.

Nebraska. None.

Nevada. Nevada has two hazardous waste funds. The "fund for the management of hazardous waste" is financed by proceeds and fees for the use of state-owned disposal facilities, civil penalties, and cost recoveries. Nev. Rev. Stat. § 444.752, *as amended by* 1985 Nev. Stat. Ch. 299, § 5. The "emergency trust fund" is financed by appropriations. *Id.* § 353.263.

New Hampshire. The "New Hampshire Hazardous Waste Cleanup Fund" is financed by fees on waste generators and hazardous waste facilities. N.H. Rev. Stat. Ann. §§ 147-B:3, -B:6, -B:8 *as amended by* 1985 N.H. Laws Ch. 346.

New Mexico. The "hazardous waste emergency fund" is financed by cost reimbursements. N.M. Stat. Ann. §§ 74-4-7, 74-4-8.

New York. The "Hazardous Waste Remedial Fund" is financed by fees on hazardous waste generators and waste facility permittees, penalties and appropriations. N.Y. State Finance Law, § 97-b; N.Y. Environmental Conservation Law, § 27-0923.

North Carolina. North Carolina has two hazardous waste funds. The "Hazardous Waste Fund" is financed by fees on waste facility operators. N.C. Gen. Stat. §§ 130A-298, 130A-294(a)(6). The "Oil or Other Hazardous Substances Pollution Protection Fund" is financed by permit fees, penalties, cost reimbursements and appropriations. *Id.* § 143-215.87.

North Dakota. None.

Ohio. Ohio has established two special hazardous waste funds. The "Hazardous Waste Facility Management Special Account" is financed by fees on owners and operators of waste disposal facilities. Ohio Rev. Code Ann. § 3734.18. The "Hazardous Waste Clean-up Special Account" is financed by penalties, reimbursement costs and miscellaneous other payments. *Id.* § 3734.28.

Oklahoma. The "Controlled Industrial Waste Fund" and "The State Emergency Fund" are financed by state appropriations. Okla. Stat. Ann. tit. 63, § 1-2018; *id.* tit. 62, §§ 139.42, 139.47, *as amended by* Okla. Sess. Law Serv. Ch. 115 (West).

Oregon. Oregon requires that waste facility owners and operators deed their sites to the state and then pay fees into a state account for closure, monitoring and remedial action. Or. Rev. Stat. §§ 459.590, 459.600.

Pennsylvania. The "Solid Waste Abatement Fund" is financed by forfeited facility operator bonds, fines and penalties. 35 Pa. Cons. Stat. Ann. § 6018.505, .605, .606 and .701.

Rhode Island. The "environmental response fund" is financed by state bonds, appropriations, penalties and cost reimbursements. R.I. Gen. Laws § 23-19.1-23.

South Carolina. The "Hazardous Waste Contingency Fund" is financed by fees on generators and owners and operators of waste facilities and by appropriations. S.C. Code Ann. §§ 44-56-160, 44-56-170.

South Dakota. None.

Tennessee. Tennessee has two hazardous waste funds. The "hazardous waste remedial action fund" is financed by fees on generators and transporters, civil penalties, fines, federal grants, and appropriations. Tenn. Code Ann. §§ 68-46-204, 68-46-203. The "responsible waste disposal incentive fund" is financed by fees on waste facility operators and appropriations. *Id.* §§ 68-46-210, 68-46-211.

Texas. Texas has four special funds. The "Disposal Facility Response Fund" is financed by state appropriations and federal grants. Tex. Water Code Ann. § 26.304. The "Texas Coastal Protection Fund" is financed by appropriations, fines, penalties and cost reimbursements. *Id.* § 26.265. The "hazardous waste generation and facility fees fund" is financed by fees on hazardous waste generators and waste facility operators. The "hazardous waste disposal fee fund" is financed by fees on waste facility operators. Tex. Civ. Stat. Ann. art. 4477-7, § 11, *as added by* 1985 Tex. Sess. Law Serv. Ch. 567 (Vernon).

Utah. Utah has a hazardous waste fund financed by cost reimbursements. Utah Code Ann. § 26-14-20.

Vermont. The "Environmental Contingency Fund" is financed by taxes on waste generators, permit application fees, cost reimbursements and federal grants. Vt. Stat. Ann. tit. 10, § 1283; Vt. Stat. Ann. tit. 32, § 10103.

Virginia. Virginia authorizes the state Water Control Board to acquire waste facilities and to collect fees from facility users. Va. Code § 32.1-178.

Washington. The "hazardous waste control and elimination account" is financed by fees on waste facility operators and on a wide range of persons engaged in waste-producing business activities, as well as by fines and penalties. Wash. Rev. Code Ann. §§ 70.105A.050, .030, .040; 70.105.180. Washington law also authorizes the collection of fees from waste facility users for the perpetual care of state waste facilities. *Id.* § 70.105.040.

West Virginia. The "Hazardous Waste Emergency Response Fund" is financed by fees on waste generators. 8 W.Va. Code §§ 20-5G-1, 20-5G-4.

Wisconsin. Wisconsin has four hazardous waste funds. The "waste management fund" is financed by fees on and certain reimbursements from waste facility owners and operators. Wis. Stat. Ann. §§ 25.45, 144.441(3), (5). The "groundwater fund" is financed by fees on generators and by miscellaneous other permit fees and fees on the sale of fertilizers and pesticides. *Id.* § 25.48, § 144.441(7). The "environmental repair fund" is financed by fees on waste facility owners and operators and cost reimbursements. *Id.* §§ 25.46, 144.442, 144.76(6)(c). The "investment and local impact fund" is financed by taxes and fees on metalliferous mine operators. *Id.* §§ 70.375, 70.395.

Wyoming. None.